FILED
APR 27 1939
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. [redacted] 39

JEAN McNEIL PEPPER,

Petitioner,

vs.

SCOTT LITTON.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 914

JEAN McNEIL PEPPER,

Petitioner,

vs.

SCOTT LITTON.

IN THE MATTER OF

DIXIE SPLINT COAL COMPANY, BANKRUPT.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The Petition of Jean McNeil Pepper respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This litigation results from the effort of Scott Litton to prevent the petitioner from collecting, in bankruptcy, the judgment of the Corporation Court of the City of Bristol, Virginia, against Dixie Splint Coal Company, now bankrupt, for $9,000.00, with interest and costs, rendered February 19, 1934.

Litton's fraudulent efforts to prevent said judgment in the first instance are fully stated in the opinion of the Supreme Court of Appeals of Virginia in the case of *Pepper* v. *Dixie Splint Coal Company*, 165 Va. 179, 181 S. E. 406, to which petitioner invites the Court's consideration.

The fraudulent conduct of Dixie Splint Coal Company is the conduct of Scott Litton. The District Court, in the course of its first opinion in this proceeding, said:

> "An examination of the facts disclosed here shows the history of a deliberate and carefully planned attempt on the part of Scott Litton and Dixie Splint Coal Company to avoid the payment of a just debt. I speak of Litton *and* Dixie Splint Coal Company because they are in reality the same" (R. 53-61).

On June 2, 1933, while the suit in the Bristol court was approaching judgment, Litton sent the secretary-treasurer of his company to the Clerk's Office of Russell County, Virginia, and attempted to have him confess judgment in Litton's favor for $33,468.89 (R. 181-184). The attempted confession of judgment was without warrant of authority required by the Virginia Code, Section 6130A. The confessed judgment was subsequently declared to be void upon its face by the Circuit Court of Russell County, Virginia (R. 153); and was held to be void by the referee (R. 109), which holding was expressly approved by the District Court although Litton had not appealed from the referee's holding (R. 120).

On June 2, 1933, the day the void judgment was docketed, Litton sued out execution thereon, but withheld levying thereunder; and no lien was secured on the company's property.

On February 19, 1934, when petitioner obtained her judgment against the company in the Bristol court, Litton then falsely represented to the Bristol court that his company intended to appeal from its judgment to the Supreme Court

of Appeals of Virginia; and on this representation secured a stay of execution on petitioner's judgment for a period of ninety days (R. 215).

On March 19, 1934, during the ninety-day period when execution was stayed on petitioner's judgment, Litton sued out a second execution on his void judgment, and on the same day levied the execution on all of the tangible property of the company; but no sale was then advertised thereunder (R. 184, 254).

On May 31, 1934, at the expiration of the ninety-day period during which execution on petitioner's judgment was stayed, petitioner sued out execution on her judgment and had it levied on June 2, 1934, on all the tangible property of the company (R. 237, 238).

On June 2, 1934, the same day on which petitioner's execution was levied, the sheriff, "who seems to have been cooperating with Litton" (R. 62), advertised a sale to be made June 14, 1934, under Litton's execution, which had been levied two and one-half months previously on all the company's property (R. 216, 217, 254, 255).

On June 13, 1934, the day preceding the advertised execution sale under the Litton void judgment, petitioner filed her bill in the Circuit Court of Russell County alleging that the Litton judgment was void; that the company was not indebted to Litton in any sum; and prayed that the sale be enjoined (R. 210). But, on account of the absence of the judge, the prayer for injunction was not acted upon.

On June 14, 1934, the execution sale under the Litton void judgment was held; and Litton became the purchaser of all the tangible property of the company at the price of $3200.00 (R. at 238).

On June 16, 1934, two days after the Litton execution sale, Litton caused the board of directors of his one-man corporation to adopt a resolution authorizing the voluntary bankruptcy of the company (R. 1); but, as will hereinafter be

shown, the company's voluntary petition in bankruptcy was not filed until eighty days later, namely, on September 4, 1934 (R. 1).

During this eighty-day interval Litton's execution levy under the confessed judgment became more than four months old; and petitioner's levy, under her execution, was yet less than four months old.

On June 16, 1934, the company resolved and duly executed to the Clinchfield Coal Corporation a release deed for the company's only available coal supply (R. 101).

On June 21, 1934, Scott Litton procured the incorporation of the Dixie Beaver Coal Corporation (R. 106), to which Litton sold all of the personal or mining property which he had purchased under his void execution sale for $3,200.00, and received capital stock of the Dixie Beaver Coal Company therefor in the par amount of $20,135.36 (R. 106).

On June 22, 1934, Litton's Dixie Beaver Coal Company, incorporated the preceding day, obtained a coal mining lease of the same premises which the Dixie Spint Coal Company had released on June 16, 1934 (R. 105-106).

On June 15, 1934, the sheriff of Russell County, Virginia, interpleaded Clinchfield Coal Corporation, petitioner, and Scott Litton, for the purpose of determining to whom the proceeds realized from the execution sale under the Litton Void judgment, namely, $3,200.00, should be paid (R. 237).

Litton and Pepper filed answers admitting the priority of the lien asserted by the Clinchfield Coal Corporation for coal rents or royalties in the amount of $2,153.00; but petitioner, by her answer, made the following express saving:

> "Without prejudice to her rights and claims asserted in the chancery cause of Jean McNeil Pepper, Executrix, etc. *v.* Scott Litton, et als., now pending in the Circuit Court of Russell County, Virginia, the general object of which is to set aside and have declared void a judgment under which the sale was made" (R. 241).

The answer quoted from is the basis of the alleged estoppel invoked by Litton against petitioner.

On September 4, 1934, the Dixie Splint Coal Company, pursuant to the resolution adopted eighty days preceding, filed its voluntary petition in bankruptcy (R. 1); and the first meeting of creditors was held September 26, 1934. Petitioner had no notice of the first meeting of creditors, and was neither present nor represented (R. 24), because Litton had not given her address, which was well known to him, in the bankruptcy schedules of said company.

At said meeting P. H. Smith, the secretary and treasurer of the bankrupt, was elected trustee; and I. M. Quillen, personal attorney for Litton, was selected as attorney for the trustee (R. 3, 4).

At this meeting Litton filed his proof of claim, claiming thereby a first lien upon the assets of the bankrupt estate by virtue of the lien of a writ of *fieri facias* issued from his confessed judgment more than four months prior to bankruptcy (R. 4, 5). The funds upon which the alleged lien was asserted came into the trustee's hands for administration by the bankruptcy court. A fund of $6,192.20 constitutes the present bankrupt estate (R. 117).

On December 18, 1934, petitioner filed objections to Litton's claim, both as a secured claim and as a common claim (R. 6). Previously petitioner had moved the Circuit Court of Russell County to quash the execution issued on the Litton void judgment (R. 228). Litton opposed this motion on the ground that such action could not be maintained by anyone "except in the name of the Trustee" (R. 230, 231).

On October 15, 1934, (R. 271), petitioner filed a petition in bankruptcy praying that the trustee be directed to contest the validity of the Litton judgment in the State courts; and on October 17, 1934, the referee entered an order granting such relief (R. 270).

On October 19, 1934, Litton's attorney protested the referee's order on the ground that petitioner had not filed formal proof of her claim in bankruptcy (R. 275-277).

The referee reheard the matter on November 8, 1934 (R. 19). At this hearing Litton's attorney made the contention "that Jean McNeil Pepper is estopped to contest the validity of the judgment of Scott Litton by reason of her acts and conduct in relation thereto." Petitioner's answer in the interpleader suit, hereinbefore quoted, was placed in evidence before the referee at this time and is the ground of the "estoppel" then attempted to be invoked by Litton (R. 21-23).

On December 18, 1934, after hearing argument of counsel, the referee in bankruptcy "for an orderly administration" of the bankrupt estate, ordered the trustee, by counsel, to institute proceedings in the Circuit Court of Russell County:

> "for the purpose of testing the validity of the judgment" (R. at 189).

By this order the referee denied the contention that petitioner was estopped to question the validity of the Litton judgment. Litton sought no review of this order.

On January 10, 1935, the trustee proceeded by a motion to abate the Litton void judgment. Prior to the date of that motion Litton purchased, or attempted to purchase, and to have withdrawn every unsecured claim in bankruptcy against the bankrupt estate except the claim of this petitioner (R. 303). At this same time no general or unsecured claim against the bankrupt estate had been either allowed or disallowed; and time remained in which to file the same (R. 321-327).

Thereafter, namely, on April 23, 1935, several unsecured claims in bankruptcy were duly allowed (R. 32-34). Petitioner's claim was not allowed until February 4, 1938 (R. 116).

The trustee, by appropriate proceedings in the State court, attempted to determine the validity or the invalidity of the Litton judgment (R. 178). The attack upon the judgment was direct; and the proceeding by the trustee was in behalf of Dixie Splint Coal Company, the bankrupt, alleged judgment-debtor. The State court erroneously decided that the right of the trustee in bankruptcy to attack the Litton judgment was acquired under Section 70e of the Bankruptcy Act (R. at 154). This section of the Act invests the trustee with the right to avoid any *transfer of property* made by the bankrupt which any *creditor* might avoid.

The State court then proceeded, over the objection of the counsel for the trustee, to determine who were, or would be, in bankruptcy, the creditors of the bankrupt estate; and, who would benefit by the success of the trustee's suit. The State court held (contrary to the actual facts) that petitioner was the sole creditor in the bankruptcy proceedings; and that the trustee in bankruptcy represented the petitioner alone (R. at 156, 157); and, that petitioner's answer, hereinbefore quoted from, "treated" the execution sale as a valid sale; and, that such treatment amounted to the "recognition" of the validity of the Litton judgment.

Upon these premises the trial court proceeded to the conclusion that the trustee was "estopped" at that time to have the Litton judgment decreed invalid; but the said court expressed the opinion in writing that the judgment was void upon its face (R. at 153).

Counsel for the trustee excepted to the trial court's adverse ruling, and appealed to the Supreme Court of Appeals of Virginia (R. 143). That court affirmed the lower court *in toto* (*Smith* v. *Litton*, 167 Va. 263, 188 S. E. 214).

On February 22, 1937, the referee overruled the petitioner's objection to the allowance of Litton's claim, holding that she was estopped to deny the validity of the Lit-

ton judgment by reason of the State court's decisions (R. 45).

On April 22, 1937, the District Court, on review, reversed the referee's decision. In a written opinion (R. 53) the court reviewed the history of the case and frauds Litton had attempted to perpetrate upon the bankruptcy court and this petitioner.

The court specifically held that the duty to administer the estate of the bankrupt belonged exclusively to the bankruptcy court and could neither be delegated nor lost.

The District Court remanded the proceedings to the referee with direction to pass upon the objections filed to the allowance of Litton's claim, both as a lien claim and as a common claim (R. 52).

On February 4, 1938, the referee in bankruptcy entered an order holding (1) that the Litton judgment was void; (2) that Litton's objection to petitioner's claim was overruled and her claim allowed as an unsecured claim; (3) that petitioner was estopped to assert objections to Litton's claim and that the claim was allowed as a secured claim; (4) that the Litton claim was valid as a common claim; (5) that petitioner was barred by laches and estopped from seeking an appraisal of the bankrupt's property sold to Litton under his void execution of sale for $3,200.00 (R. 107-116).

Litton did not seek review of the two holdings of the referee which were adverse to him, to-wit: that his confessed judgment is void, and that his objections to petitioner's claim be overruled. These holdings thus became final.

Petitioner, however, sought review of the referee's holdings that were adverse to her (R. 117-120); and on June 23, 1938, the District Court sustained her contentions, and entered an order disallowing Litton's claim either as a secured claim or as a common claim (R. 120, 121).

The written opinion of the court discloses that *the claim was disallowed because the Litton judgment was void, and,*

because the account on which the judgment had been confessed was fraudulent and fictitious (R. 122-132).

Litton appealed to the Circuit Court of Appeals for the Fourth Circuit from the order of the District Court in disallowing his claim both as a lien claim and as a common claim (R. 403).

On January 9, 1939, the Circuit Court of Appeals (*Litton* v. *Pepper*, 100 F. (2d) 830) reversed the District Court" with instructions to give effect to the decision of the State court (*Smith, Trustee,* v. *Scott Litton,* 167 Va. 263, 188 S. E. 214).

On February 28, 1939, the Circuit Court of Appeals denied a rehearing petitioned for by this petitioner (R. 453).

B.

Jurisdictional Statement.

Petitioner shows that this Court has jurisdiction to review the judgment of the Circuit Court of Appeals by virtue of Bankruptcy Act, Section 24c, as amended June 22, 1938, 52 Stat. 854 (11 U. S. C. A., Section 47c), which provides:

> "The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

This Court has jurisdiction to review the judgment complained of by certiorari. Judicial Code, Section 240 (28 U. S. C. A., Sec. 347), provides that in any case in a circuit court of appeals it shall be competent for this Court, upon the petition of any party thereto, to require by cer-

tiorari that the cause be certified to this Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought up by unrestricted writ of error or appeal.

C.

The Questions Presented.

Petitioner submits that the record in this cause presents for determination the following questions:

1. Did the court of bankruptcy have exclusive, non-delegable jurisdiction to adjudge whether the claim of Scott Litton should be allowed for payment from assets of the bankrupt estate in the control and custody of the bankruptcy court?

2. Will the court of bankruptcy permit its processes to be used in the consummation of an obviously fraudulent scheme; or, lend its aid to one who is proved guilty of conduct in violation of the fundamental conceptions of equity jurisprudence?

D.

Reasons Relied on for Allowance of the Writ.

Petitioner relies upon the following reasons for the allowance of a writ of certiorari:

1. The decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court on the jurisdiction of courts of bankruptcy.

The Circuit Court of Appeals held, in effect, that the District Court as a court of bankruptcy did not have exclusive, non-delegable jurisdiction to allow or disallow a claim presented for allowance and payment in the bankruptcy court.

This Court has repeatedly held that the jurisdiction of

the courts of bankruptcy in such matters is not only paramount, but exclusive of all other courts:

U. S. F. & G. Co. v. *Bray*, 225 U. S. 205, 32 S. Ct. 620, 56 L. Ed. 1055;

U. S. v. *Wood*, 290 Fed. 109, affirmed 263 U. S. 680, 44 S. Ct. 134.

This Court has also held that the jurisdiction to allow, disallow and reconsider claims filed in bankruptcy cannot be abandoned, delegated or surrendered, even by the bankruptcy court itself:

Isaacs v. *Hobbs T. & T. Co.*, 282 U. S. 739, 51 S. Ct. 270, 75 L. Ed. 645;

Gross v. *Irving Trust Co.*, 289 U. S. 342, 53 S. Ct. 605, 77 L. Ed. 1243.

The Circuit Court of Appeals also decided contrary to the applicable decisions of this Court on the requirements for the applicability of the rule of *res judicata*. Said court held that the judgment of the State court, although rendered in a suit upon a different subject matter and for a different purpose, should be accorded binding effect in the bankruptcy court in a contest over the allowability of a claim. This Court has repeatedly held that for a plea of *res judicata* to be availing it must be shown that the judgment relied on was (1) made by a court of competent jurisdiction, (2) upon the same subject matter, (3) between the same parties, and (4) for the same purpose.

Aspden v. *Nixon*, 4 How. 467, 11 L. Ed. 1059;

Washington, etc., Packet Co. v. *Sickles*, 24 How. (65 U. S.) 333, 16 L. Ed. 650.

The Circuit Court of Appeals also held contrary to the decisions of this Court that the suit in the Circuit Court of Russell County, Virginia, by the trustee against Litton was

in the nature of a suit against an "adverse claimant" concerning property acquired or claimed by the trustee.

This Court has held that one claiming to be a lienholder on property or funds in the custody and control of the bankruptcy court (such as Litton is doing in this case), is not an "adverse claimant"; and that, therefore, the bankruptcy court has exclusive jurisdiction to pass upon the asserted lien claim.

Ex Parte City Bank, 3 How. 292, 11 L. Ed. 603;
Norton v. *Boyd*, 3 How. 426, 11 L. Ed. 664.

2. The decision of the Circuit Court of Appeals, in this proceeding, condones and sanctions the obvious frauds perpetrated and attempted to be perpetrated by Litton. Its effect is to give to Litton, the wrong-doer, all of the assets of the bankrupt estate to the exclusion of this petitioner.

The decision of the Circuit Court of Appeals is, therefore, in conflict with the repeated decisions of this Court, and of all equitable principles.

Buffum v. *Peter Barceloux*, 289 U. S. 227, 53 S. Ct. 539;
Mitchell v. *Commissioner*, 91 U. S. 206, 23 L. Ed. 302;
Dent v. *Ferguson*, 132 U. S. 50, 33 L. Ed. 242;
Randolph v. *Quidnick*, 135 U. S. 457, 34 L. Ed. 200;
Pomeroy's Eq. Jur. (3rd ed.), Vol. 1, Section 397.

Petitioner shows that she made an effort to diminish, from two hundred to one hundred pages, the printed record of *Smith, Trustee*, v. *Scott Litton*, in an effort to avoid unnecessary cost in the presentation of this petition; but Litton refused to make any agreement whatever concerning the diminution of the record.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that court

to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 4378, Jean McNeil Pepper, Appellant, *vs.* Scott Litton, Appellee, in the matter of Dixie Splint Coal Company, Bankrupt; and that the said judgment of the United States Circuit Court of Appeals for the Fourth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

JEAN MCNEIL PEPPER,
By M. M. HEUSER,
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Counsel for Petitioner.

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